and dislocation of the right ankle and cracked right frontal bone. He walks with a slight limp and has lost full range of movements in the joint. He tires easily when walking long distances and finds difficulty walking on rough ground. The dislocation of the mandibular cartilage not only interferes with his mastication but also makes a clicking noise when opening or shutting his mouth. Further, arthritis is likely to develop. Buttrose J. awarded him general damages of $10,000 ($7,000 for fractured jaw and $3,000 for ankle).

The plaintiff in *M. Alagappan s/o Muthuraman* v. *The Government of the Republic of Singapore & Anor.*[4] sustained fracture of mandible and fracture dislocation of the distal end of the right radius and cerebral concussion. There was no residual disability as far as the jaw was concerned. He was awarded general damages of $10,000 ($7,000 for the jaw and $3,000 for the wrist).

A female telephone operator aged 22 years in *Saniah & Ors.* v. *Abdul Hamid & Ors.*[5] sustained fracture of the jaw and other injuries. There was no disability resulting from the injuries. However, she suffered from protosis of the right eye. MacIntyre J., as he then was, awarded her general damages of $8,500. In *Kepong Mines Ltd. & Anor.* v. *Chee Sing Kau*[6] plaintiff sustained fracture of the mandible, contusion of the bladder with rupture of the tip of the urethera, loss of two molar teeth and a lacerated wound in the left thigh. He was awarded $10,000 general damages. The court dismissed the appeal on quantum.

Having regard to the nature of the injuries, the disabilities, the trend of awards in comparable cases, and taking into consideration various factors the award of $2,500 was inordinately low. We consider a fair and reasonable sum should be $8,000. Accordingly, we allowed the appeal by increasing the general damages to $8,000 with interest at 6% per annum from the date of service of the writ to date of payment. Costs to be taxed to appellant both here and the court below. Deposit to be refunded to appellant. The money due to appellant is to be deposited with the Public Trustee to be used for his benefit until he attains majority.

Appeal allowed.

Solicitors: *M.S. Sandhu & Co.; Ho & Co.*

TONG LEE HUA v. YONG KAH CHIN

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Chang Min Tat F.JJ.) November 6 and 27, 1978]

[Kuala Lumpur — Federal Court Civil Appeal No. 83 of 1978]

Practice and Procedure — Summary judgment — No defence on merits — Option for purchase of land — Brokerage — R.S.C. 1957, O. 14.

Contract — Option relating to sale of land — Claim for brokerage commission.

The respondent claimed brokerage commission for successfully putting through the sale of land to the appellant. The respondent applied for summary judgment but the appellant opposed it on the ground *inter alia* that the sale did not come about through the brokerage of the respondent. Both the Senior Assistant Registrar and the judge on appeal considered that the appellant had shown no defence on merits and had not raised a triable issue. The appellant appealed.

Held, dismissing the appeal: on the facts the respondent was the broker who had brought about the sale and was entitled to the commission.

HIGH COURT.

K. Thayalan for the plaintiff.

G.T. Rajan for the defendant.

Cur. Adv. Vult.

Vohrah J.: This is an appeal by the defendant against the decision of the Senior Assistant Registrar granting leave to the plaintiff to sign final judgment against him in the sum of $95,062.50 plus interest and costs under Order 14 of the Rules of the Supreme Court, 1957.

The facts leading to the action out of which this appeal has arisen are as follows. The defendant wished to purchase certain lands held under E.M.R. Nos. 8292, 4367, 4366, 4365, 4369, 6851 and 1230 for Lots 737, 738, 742, 741, 745, 5927 and 746 respectively, all in the Mukim of Klang (hereinafter referred to as "the land"). Negotiations for the purchase of the land were conducted through the plaintiff who on November 4, 1975 obtained an option in writing in his favour for the sale of land at the price of $65,000 per acre purportedly valid for five days from that date signed by Yong Yoke Lin and Chong You (f). On November 6, 1975 the plaintiff executed a sub-option in favour of the defendant or his nominee(s) for the sale of this land operative for the same period at the same price. On the same date the defendant gave the plaintiff a written undertaking to pay the plaintiff a commission of 6½% of the total purchase price of the land upon the successful conclusion of the sale of the land to him or his nominee(s). In the event the land was sold to the defendant's wife and nominee, Chong Mui Lan, for the sum of $1,462,500. Subsequently, defendant having refused to pay, the plaintiff filed this action for the recovery of his commission of 6½% of this sum amounting to $92,062.50. In a nutshell, the defendant claimed in his defence that the sale did not take place as a result of the exercise of the option or sub-option both of which he claimed were defective and that accordingly they could not have been exercised. Hence he was not liable to the plaintiff.

It is commonplace that an application for summary judgment under Order 14 can be successfully resisted by a defendant if he manages to raise a *bona*

fide triable issue, i.e., a defence on the merits. In other words he must be able to raise a legal defence which if it is believed goes to the root of the claim. In the instant case it was not disputed that the land had been transferred to the defendant's wife/nominee. The Senior Assistant Registrar found on the documentary evidence before him that the sale was effected through the instrumentality of the plaintiff and with this finding I am in complete agreement. Irrespective of the validity or otherwise of the option and sub-option, it is perfectly clear that the defendant undertook in writing (as evidenced by Exhibit YKC-5 annexed to the plaintiff's affidavit of August 23, 1977) that he would pay the commission to the plaintiff on the successful conclusion of the sale. Counsel for the defendant contended that this undertaking had not been supported by any consideration. The short answer to this is that at the time of the making of this document by the defendant no contractual nexus existed in relation thereto between the plaintiff and the defendant. The consideration moving from the plaintiff was executory and the defendant was under no obligation to the plaintiff until that consideration was executed. But on the successful conclusion of the sale through the efforts of the plaintiff that consideration was executed and the defendant's obligation to pay the plaintiff the commission immediately arose. It would appear that it was also the contention by implication of counsel for the defendant that the exercise of a valid option and/or sub-option giving rise to the sale and purchase was a condition precedent to the liability of the defendant to pay the commission to the plaintiff. There was, however, no evidence before the court to this effect even from the defendant himself. I would imagine that the obvious reason for the plaintiff obtaining the option in his favour, valid or otherwise, was an attempt to ensure that at least for a limited period of a few days he had the exclusive right to find a purchaser and thus become entitled to brokerage. Similarly, the sub-option would have been desirable from the defendant's point of view to preclude the possibility of the plaintiff arranging a sale to some purchaser other than the defendant or his nominee(s).

For the above reasons I am of the view that the defendant has raised no triable issue which could amount to a defence to the plaintiff's claim. Accordingly it is clear that the order of the Senior Assistant Registrar granting leave to sign final judgment must stand. In the result this appeal is dismissed with costs. The stay of execution ordered by this court on February 22, 1978 is hereby determined. I award costs of that application for stay to the plaintiff.

From the above judgment the defendant appealed.

FEDERAL COURT.

G.T. Rajan for the appellant.

K. Thayalan for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): Both the Senior Assistant Registrar before whom the Order 14 application was set and the judge on appeal to him considered that the appellant had shown no defence on the merits and had raised no triable issue. The appellant however contended that the claim should go to trial.

The claim of the respondent against the appellant was, if a little breath is blown to clear the smoke that legal arguments surrounded it with, nothing more or less than a claim for brokerage from the purchaser and is founded, in this case, not on practice or an implied promise but on an express promise from the respondent as purchaser. It is contained in a document given by the appellant on his own letterhead to the respondent and is in these words:

"I, TONG LEE HWA, of No. 30-32 Jalan Susur/Jalan Sireh, Off Persiaran Tengah, Klang, do hereby give an undertaking to Mr. Yong Kah Chin of No. 9, Sultan Lane, Kuala Lumpur, that upon the sale of the properties on Lot Nos: 5927, 737, 738, 741, 742, 743 and 745, Mukim of Klang and upon execution of a formal agreement and upon the sale being successful between the Vendors and the Purchaser or Purchasers to me or my nominee or nominees, a commission of 6½% (Six and a half percent) of the total consideration of the sale price will be paid accordingly.

Sgd.

.....

TONG LEE HWA

Dated this 6th day of November 1975"

This note is a clear and unqualified undertaking to pay brokerage in the event of the appellant successfully obtaining the property in question and though the commission of 6½% of the purchase price is considerably more than the customary purchaser's commission of, as we understand it, 2%, and on a sale price of $1,462,500 it came to a substantial $95,062.50, that was the bargain made by the appellant with the respondent and in the absence of any circumstance releasing him from his bargain, the appellant must ordinarily be held to it, on a successful sale to the appellant or his nominee.

On June 23, 1977, transfers by the living vendors and the personal representatives of the owners who were deceased were registered in the name of Chi Liung Holdings Sdn. Bhd. which, it is undisputed, is the nominee of the appellant. The sale was therefore successful, but the appellant contended, among other things, that the sale did not come about through the brokerage of the respondent.

The history of the events, largely undisputed, leading to the sale, is as follows: on November 7, 1975, that is, the day after the appellant had given the respondent the written undertaking to pay brokerage, a firm of solicitors M/s. T. Tharu & Co., acting on behalf of one Madam Chong Mui Lan who is the wife of the appellant, wrote on instructions to the solicitors for the vendors the following letter: —

"7th November 1975

Messrs. S.M. Yong & Co.,
Advocates & Solicitors,
No. 52, Jalan Klyne,
(1st Floor),
Kuala Lumpur.

BY HAND

Dear Sirs,

re: Purchase of lands held under Lot 5927, 737, 738, 741, 742, 743 & 745 all in the Mukim of Klang.

We act on behalf of Madam Chong Mui Lan of Kuala Lumpur who has instructed us to write to your good-office with regards to the purchase of the abovementioned properties.

Our client is in receipt of an Option dated 4th November 1975 granted by Messrs. Yong Yoke Lin and others (the registered

owners of the said lands) to one, Mr. Yong Kah Chin of Kuala Lumpur for the sale of the abovementioned lands. The price stated therein is at the rate of $65,000 per acre. We, therefore, have instructions from our client to write and confirm with your good-office that she intends to hereby exercise the aforesaid Option on the terms set out therein to purchase all that lands held under Lot 5927, 737, 738, 741, 742, 743 and 745 all in the Mukim of Klang, at the price of $65,000 per acre. Would your good-office therefore kindly inform your good-clients i.e. the registered owners of the aforesaid lands of our client's acceptance.

We would prepare the Sale & Purchase Agreement and forward the same to you for your perusal.

Kindly acknowledge receipt by signing the duplicate copy of this letter.

Yours faithfully,
Sgd.
c.c. Client."

The option referred to is as follows:

"OPTION

Mr. Yong Kah Chin,
Kuala Lumpur.

We, the undersigned, the Registered owners of the land Lot Nos. 5927, 737, 738, 741, 742, 743, and 745, Mukim of Klang, hereby confirm that one Ringgit has been fully paid and authorise you the option to sell our land at the price of $65,000 per acre (Ringgit Sixty Five Thousand) only.

Any costs regarding the proposed drainage system alongside the land, to be constructed by the Government shall be borne by the purchaser, and it is not vacated at the deliverance.

It is hereby agreed in the event of the sale as stipulated herein, confirm that Mr. Yong Kah Chin shall be entitled 1% (one percent), Md. Ooi Lay Lee shall be entitled 1% (one per cent), commission of the total amount of the sale price.

This option is valid for five days from 4th November 1975 to 8th November 1975.

Sgd.

.....

Signed by the Registered owners,
Mr. Yong Yoke Lin
Md. Cheong You

Date: 4th November 1975."

It is undisputed that the grantors of this option did not themselves own all the lands. Yong Yoke Lin was at the relevant time the owner of Lots 741, 745 and 746 only. Madam Chong You was the registered owner of a 1/3rd undivided share in 3 other pieces, Lots 737, 738 and 742. The other two owners were dead and their shares had been transmitted to trustees, Yong Yoke Lin being a co-trustee in the estate of one of the two deceased owners. The registered owner of the remaining piece Lot 5927 was also dead, and Madam Chong You was also one of the two trustees. It is correct, therefore, that, *ex facie*, the option did not appear to have been validly granted or more correctly, validly granted over all the lands, but there is an earlier option to Mr. Yong Yoke Lin and Madam Chong You from these personal representatives in respect of these 4 pieces of lands which supplied the link and validated the option granted by Yong Yoke Lin and Madam Chong You for themselves and on behalf of the other owners to the respondent.

But apparently the option that was shown to Mr. Edmund Yong of M/s. S.M. Yong & Co. was only the one given to the respondent. It led to a contretemps which the appellant then sought to make capital of. He rejected the option as not being genuine and he refused to acknowledge receipt of the letter giving notice of the exercise of the option. M/s. T. Tharu & Co. advised Madam Chong Mui Lan accordingly. But the price offered was what the vendors wanted for their lands and the suggestion between the solicitors was that the sale could be proceeded with. This was acceptable to the purported purchaser and M/s. T. Tharu & Co. addressed the following letter to M/s. S.M. Yong & Co.:

"November 12, 1975

Messrs. Dato's S.M. Yong & Co.,
Advocates & Solicitors,
52 Jalan Klyne (1st Floor),
Kuala Lumpur.

Dear Sirs,

Purchase of lands held under Lot 5927, 737, 738, 741, 742 743 & 745 all in the Mukim of Klang.

We refer to our letter dated 7th November 1975 and to the telephone conversation between your Mr. Edmund Yong and our Mr. T. Tharu of the same date wherein it was confirmed that your clients have agreed to sell the abovementioned properties at the price of $65,000 per acre. . . ."

The rest of the letter dealt with the terms of payment.

The offer was accepted, subject to approval of the suggested terms of payment. In the event, a formal agreement was drawn up between the vendors and Madam Chong Mui Lan giving effect to the sale and executed by all the parties. And it is to be noted that the respondent still played a part — he was the witness for some of the vendors.

Subsequently when a dispute arose whether the appellant was bound to pay the commission or brokerage to the respondent, Mr. Edmund Yong wrote a letter on June 8, 1977 to the appellant advising that his clients, the vendors, had confirmed to him that they did give the option to the respondent and that as a result of that option the lands were sold to his nominee, his wife. This was clearly a correction on his part but the appellant nevertheless contended that the option was not genuine and that the sale did not "arise from the alleged option."

In his affidavit opposing the Order 14 application, the appellant gave another reason why he considered the option invalid. It was not held by the respondent alone. It was in the joint names of the respondent and another person Madam Ooi Lay Lee and the purported exercise of it by the respondent alone was therefore said not to be valid. He maintained this despite the affidavit of Madam Ooi Lay Lee that the exercise of the option by the respondent was with her full knowledge and consent. In his submission, he suggested that this evidence as well as that of the owners of the land on the genuineness of the option and the exercise of it should be tested in the witness box by cross-examination of the owners and possibly Mr. Edmund Yong, and that itself raised a triable issue which would defeat the application and justify an order that he be allowed to defend the action unconditionally.

The short answer, in our view and with respect, is that this is *"res inter alios acta."* It is no real concern of the appellant how or in what circumstances the option was given or exercised. These are matters between the donors and the donee. The actual question with which he was concerned was whether he had bought the lands through the medium or brokerage of the respondent.

And the answer to this question lies in the letter of his then solicitors of November 7, 1975. The part played by the respondent in effecting the purchase is clear and beyond argument. Confirmation, if necessary, can be found in the previous correspondence between the parties in person. The appellant had long desired to buy but could only do so through the respondent. Until April 1975, his efforts had failed. On April 29, 1975, he raised his offer to $55,000, when it was suggested to him by the respondent that the matter was of some urgency since one of the owners to whom he was related was in frail health. The respondent later in November of the same year obtained the consent of all the owners directly and in some cases, indirectly, to a sale at $65,000 per acre and he succeeded in interesting the appellant at this price as evidenced by his accepting a so-called sub-option and giving his own promise to pay brokerage and by his instructing M/s. T. Tharu & Co. to buy at this price.

Neither the Senior Assistant Registrar nor the High Court Judge had any doubt about the part played by the respondent. They could not understand how his introduction of the appellant's nominee to the vendors could be regarded as never having happened at all because of an initial mistake, later amply corrected, made in rejecting the option held by him.

For ourselves, we would put the case thus: suppose the respondent never had any option at all, but the sale was effected in truth and in fact through his introducing the purchaser to the vendors or to borrow a term from the Stock Exchange, if a valid contract was the result of the 'marriage' of the vendors' offer to sell and the purchaser's offer to buy through the intermediation of the broker arising from his knowledge or information gained by him that the vendors were prepared to sell at a certain price and the purchaser was agreeable to buying at that price, could the respondent be said not to be the broker who had brought about the sale and could he be denied the commission the purchaser had promised to pay?

The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *G.T. Rajan & Co.; Skrine & Co.*

TAN BOON HOCK v. PUBLIC PROSECUTOR

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat & Syed Othman F.JJ., Tan Chiaw Thong & Yusoff JJ.) November 22, 1978]

[Kuching — Federal Court Criminal Reference No. 2 of 1978]

Criminal Law and Procedure — Conviction quashed on appeal — Whether appellate court has power to order retrial — Whether appellate court can release appellant on bail — Criminal Procedure Code (F.M.S. Cap. 6) ss. 4, 5, 316(b), 390(ii) — Courts of Judicature Act, 1964, ss. 22, 26, 30.

In this case the appellant had been convicted on a charge which alleged that he "detained" stolen property. On appeal the conviction was quashed and the learned judge ordered a retrial and also ordered the release of the appellant on bail to appear before the District Court. The learned judge thereupon reserved the following two questions for the opinion of the Federal Court —

1. Whether a judge of the High Court sitting as an appellate court has jurisdiction to order the appellant to be retried on a proper charge after quashing his conviction on the ground that on account of the wording of the charge the appellant was charged and convicted of an offence unknown to the law.

2. Whether a judge of the High Court sitting as an appellate court has jurisdiction on the application of the appellant or his counsel to make an order releasing the appellant on bail in the sum of $500 with one surety and to appear before a Magistrate when called upon to do so when ordering the appellant to be retried on a proper charge after quashing his conviction.

Held: (1) the power of an appellate court to order a retrial on a proper charge before another Magistrate when it is of opinion that an accused person was convicted on a wrong charge is discretionary. In the present case since it was held there was no proper charge ordering a retrial was most appropriate and the learned judge had exercised his discretion properly;

(2) since the learned judge had ordered a retrial he had power to order the appellant to be released on bail and to appear before a District Judge.

Case referred to:-

(1) *D.P.P. of Jamaica* v. *White* [1978] 3 All E.R. 1003.

FEDERAL COURT.

T.O. Thomas for the appellant.

Abdul Khalid bin Abdul Manaff (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): We stated that the answers to both questions were in the affirmative and that we would give our reasons later. We do so now.

Appellant was convicted on his own plea and sentenced to one month's imprisonment by the District Court on the following charge: —

"That you sometime in the month of July 1975 at 10.15 a.m. at Padungan Road, Kuching, dishonestly detained stolen property, to wit, one car tape-recorder, belonging to Lim Chiang Hua (m) having reason to believe the same to be stolen property and thereby committed an offence punishable under section 411 of the Penal Code."

On appeal the prosecution conceded that appellant was convicted of an offence unknown to law by reason of the fact that the word "detained" was used instead of "retained". Consequently, the learned judge quashed the conviction, set aside the sentence, ordered a retrial before another magistrate and also ordered the release of appellant on bail to appear before the District Court. On the application of appellant, that in deciding the appeal the learned judge had no jurisdiction to quash the conviction and at the same time order a retrial and release of appellant on